No. 96-670

Supreme Court U.S.
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In the
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., In His Official Capacity as Governor of Louisiana, and W. FOX McKEITHEN, In His Official Capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed: October 28, 1996
Petition For Certiorari Granted : March 17, 1997

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U. S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(Baton Rouge)

Love, Et Al.

v.

Edwards, Et Al.

Filed: 08/07/95

CIVIL DOCKET FOR CASE #: 95-CV-788

8/7/95	1	COMPLAINT Filing Fee $120.00 Receipt #57419 (ph) [Entry date 08/08/95]
9/5/95	9	MOTION by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois for Summary Judgment (Motion Hearing set for 9:00 11/17/95) (ph) [Entry date 09/06/95]
9/5/95	11	MOTION by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois for Expedited hearing on motion for SJ (ph) [Entry date 09/06/95]
9/6/95	12	FIRST AMENDED COMPLAINT for declaratory relief and permanent injunctive relief (Answer due 9/18/95 for Fox McKeithen, for Edwin Edwards) by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois amending [1-1] complaint (sh) [Entry date 09/07/95]

9/14/95	13	ORDER granting [11-1] motion for Expedited Hearing, Motion Hearing set for 9:00 10/23/95 for [9-1] motion for Summary Judgment with oral argument (signed by Judge Frank J. Polo-zola), issued notices. (ph)
9/18/95	14	ANSWER to Complaint by Edwin Edwards, Fox McKeithen (Attorney Sheri M. Morris). (ph) [Entry date 09/19/95]
10/4/95	18	MOTION by Edwin Edwards, Fox McKeithen for Summary Judgment (Motion hearing set for 9:00 12/1/95) (ph) [Entry date 10/05/95]
10/4/95	20	MOTION by Edwin Edwards, Fox McKeithen for Expedited Hearing on motion for SJ (ph) [Entry date 10/05/95]
10/4/95	21	ORDER granting [20-1] motion for Expedited Hearing, Motion Hearing set for 10/23/95 for [18-1] motion for Summary Judgment (signed by Judge Frank J. Polozola), issued notices. (ph)
2/16/96	25	LETTER to FPJ/Daniel Balhoff...re: req a tele status conf...FJP advised that there is no need for conf and Dan Balhoff was advised via telephone on 2/16/96 (rg)
4/11/96	26	RULING granting [18-1] dfts' motion by for Summary judgment, denying [9-1] pltf's motion for Summary Judgment. Judgment Shall be entered dismissing the pltfs suite with prejudice. (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 04/12/96]
4/12/96	27	JUDGMENT for dfts Edwin Edwards, Fox McKeithen against pltfs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois dismissing this

suit with prejudice. (signed by Judge Frank J. Polozola), issued notices. (hj)

4/24/96	28	NOTICE OF APPEAL, by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois. Appeal record due on 5/24/96 (ph)

GENERAL DOCKET
FIFTH CIRCUIT COURT OF APPEALS

Love, Et Al.

v.

Foster, McKeithen, Et Al.

Appeal from Middle District of Louisiana, Baton Rouge

COURT OF APPEALS DOCKET#: 96-30429

4/25/96	Civil Rights case docketed. NOA filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant, Bennie Baker-Bourgeois. [96-30429] Fee due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
4/25/96	MOTION filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois to expedite appeal. [284749-] [96-30429] (jmp)
4/26/96	COURT ORDER filed granting motion to expedite appeal. [284749-] (jlw) Copies to all counsel. [96-30429] Oral argument and briefing schedule to be established by the Clerk of Court.
4/29/96	EXPEDITED BRIEFING NOTICE issued. [96-30429] A/Pet's Brief due on 5/3/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. E/Res's Brief due on 5/17/96 for Fox McKeithen, for Michael J. Foster. Reply Brief due on 5/24/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)

5/6/96	APPELLANT'S BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant, Bennie Baker-Bourgeois. Copies of brief: 7. # of pages: 34. Date of COS: 05/03/96. Sufficient [Y/N]: N Binding Insufficient. [96-30429] A/Pet's Brief ddl satisfied. Sufficient Brief due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
5/6/96	Record excerpts filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. # of copies: 4. Sufficient [Y/N]: N - No Binding. [96-30429] Sufficient Record Excerpts due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
5/20/96	APPELLEE'S BRIEF filed by Appellee Michael J. Foster, Appellee Fox McKeithen, Copies of Brief: 7. # of pages: 19. Date of COS: 05/17/96. Sufficient [Y/N]: Y. [96-30429] E/Res's Brief ddl satisfied. (dmd)
5/24/96	CASE CALENDARED for oral argument.
5/30/96	REPLY BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. Copies of Brief: 7. # of

pages: 13. Date of COS: 05/28/96. Sufficient [Y/N]: Y. [96-30429] (dmd)

5/30/96 COURT ORDER filed denying suggestion for hearing en banc [30738-] (wed) Copies to all counsel. [96-30429] (THIS ORDER WAS ENTERED TO REFLECT THAT NO POLL WAS TAKEN IN CONJUNCTION WITH THE ORDER PREVIOUSLY ENTERED, DENYING SAME) (pok)

6/19/96 SUPPLEMENTAL LETTER BRIEF requested of Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois, Appellee Michael J. Foster, Appellee Fox McKeithen for questions from panel. A br due: 6/25/96 E br due: 7/2/96 [96-30429] (vlb)

6/25/96 SUPPLEMENTAL LETTER BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. Copies of Brief: 4. # of pages: 13. Date of COS: 6/25/96 [96-30429] A/Pet Supplemental Brief ddl satisfied. (vlb)

7/2/96 SUPPLEMENTAL LETTER BRIEF filed by Appellee Michael J. Foster, Appellee Fox McKeithen. Copies of Brief: 4. # of pages: Date of COS: 0702/96. [96-30429] E/Res Supplemental Brief ddl satisfied. (dmd)

7/8/96 ORAL ARGUMENT heard. Case argued by Roy A. Mongrue for Appellee Fox McKeithen, Appellee Michael J. Foster, M. Miller Baker for Appellant Bennie Baker-Bourgeois, Appellant Kathleen B. Balhoff, Appellant Paul S. Bergeron, Appellant

Scott Love [96-30429] (vlb)

7/15/96 FILING LETTER of Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois dated 7/15/96 requesting it be brought to panel's attention as soon as possible. It deals with election qualifications, etc. [96-30429] (jmp)

7/30/96 OPINION filed. Issd in T form? Y Issue Mandate due on 8/20/96. [96-30429] (dse)

7/30/96 JUDGMENT entered and filed. [96-30429] (dse)

8/12/96 SUGGESTION filed by Appellee Michael J. Foster, Appellee Fox McKeithen for hearing en banc. # of copies filed: 20. [384959-1] Issue Mandate ddl cancelled. [96-30429] (ccb)

9/10/96 RESPONSE/OPPOSITION filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois to suggestion for rehearing en banc as requested by the Court [384959-1] by Appellee Michael J. Foster, Appellee Fox McKeithen. [409138-1] [96-30429] (ksw)

11/5/96 SUPREME COURT NOTICE that petition for certiorari was filed on 10/28/96 by Appellee Michael J. Foster, Appellee Fox McKeithen. Supct. No.: 96-670. (dmd)

11/15/96 COURT ORDER filed denying suggestion for rehearing en banc [384959] With poll (Y/N)?: Y Issue Mandate due on 11/22/96. *(wed,jld,Fallon)* Copies to all counsel. [96-30429] (DENNIS, DISSENTS FROM FAILURE TO GRANT REHEAR-

ING EN BANC, WITH WHOM POLITZ AND SMITH JOINED) (rmf)

11/26/96	35	MANDATE issued. Approved BOC issued (Y/N)?: Y. [96-30429] Issue Mandate ddl satisfied. (dmd)
3/24/97	36	SUPREME COURT ORDER received granting petition certiorari [463603-1] filed by Appellee Michael J. Foster, Jr., Appellee Fox McKeithen on 3/17/97. [96-30429]. (ksw)

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

v.

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PERMANENT INJUNCTIVE RELIEF
(Filed: 09/06/95

Plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, by counsel, as and for their First Amended Complaint against Defendants Edwin W. Edwards, Governor of Louisiana, and Fox McKeithen, Secretary of State of Louisiana, allege upon information and belief as follows:

NATURE OF THE ACTION

1. This is a federal civil rights action brought under 42 U.S.C. § 1983 against Defendants for conducting, under color of state law, regular congressional elections in Louisiana on dates earlier than the day mandated by federal law, in violation of Plaintiffs' federal statutory and constitutional rights.

2. An actual, justiciable controversy exists between the parties over Defendants' holding of regular congressional elections within the State of Louisiana on dates earlier that the day

required by federal law. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201, 42, U.S.C. §1983, and FED. R. CIV. P. 57, and permanent injunctive relief pursuant to 28 U.S.C. § 2202, 42 U.S.C. § 1983, and FED. R. CIV. P. 65 requiring Defendants to conduct all future regular elections in Louisiana for U. S. Representative and U. S. Senator, including the impending 1996 elections, on the dates compelled by federal law.

THE PARTIES

3. Plaintiff G. Scott Love is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Love is a registered voter who resides in the Sixth Congressional District of Louisiana. Love has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

4. Plaintiff Paul S. Bergeron is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Bergeron is a registered voter who resides in the Sixth Congressional District of Louisiana. Bergeron has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

5. Plaintiff Kathleen B. Balhoff is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Balhoff is a registered voter who resides in the Sixth Congressional District of Louisiana. Balhoff has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

6. Plaintiff Bennie Baker-Bourgeois is a citizen of Louisiana

and of the United States who resides in Lafourche Parish, Louisiana. Baker-Bourgeois is a registered voter who resides in the Third Congressional District of Louisiana. Baker-Bourgeois has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

7. Defendant Edwin W. Edwards is Governor of the State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to Article IV, § 5 of the Louisiana Constitution, Edwards is responsible for executing the laws of Louisiana. Edwards is sued in his official capacity.

8. Defendant Fox McKeithen is Secretary of State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to LA. R.S. § 18:421, McKeithen is the chief election officer of Louisiana. Pursuant to LA. R.S. § 18:1277, McKeithen is also responsible for certifying the results of congressional elections. McKeithen is sued in his official capacity.

JURISDICTION

9. This action arises under 42 U.S.C. § 1983, 2 U.S.C. §§ 7 and 1, the Supremacy Clause of Article VI of the U.S. Constitution, and the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

10. The jurisdiction of this Court over claims arising under 2 U.S.C. §§ 7 and 1 and the U.S. Constitution is founded on 28 U.S.C. § 1331.

VENUE

12. Venue in this Court is proper under 28 U.S.C. § 1391(b).

THE CAUSE OF ACTION

Federal Law Requirements for the Timing of Congressional & Presidential Elections

13. Article I, § 4, cl. 1 of the U.S. Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

14. Acting pursuant to its constitutional authority under Article I, § 4, cl. 1, in 1872 Congress enacted 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Hereinafter, the date prescribed by 2 U.S.C. § 7 for the holding of regular elections for U.S. Representatives is referred to as "Federal Election Day."

15. Title 2, § 1 of the U.S. Code requires that in U.S. Senate election years, regular elections of U.S. Senators throughout the United States shall take place on Federal Election Day.

16. Under authority granted by Article II, § 1, cl. 4 of the U.S. Constitution, Congress has mandated in 3 U.S.C. § 1 that in Presidential election years, presidential Electors throughout the United States shall be appointed by the States on Federal Election Day.

17. Article VI, § 2 of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

Louisiana Law Governing the Timing of Congressional & Presidential Elections

19. LA. R.S. § 18:1272(A) provides:

> All general elections for representatives in Congress ... shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. *The primary election shall be held on the first Saturday in October next preceding the date of the general election.*

(emphasis added).

20. LA. R.S. § 18:402(B)(1) provides: *"Congressional primary elections shall be held on the first Saturday in October of an election year."* (emphasis added).

21. LA. R.S. § 18:1272(B) provides that a U.S. Senator, in the year prior to the expiration of an incumbent's term, shall be elected "at the same time and at the same polling places as representatives in Congress."

22. Regarding the election of U.S. Representatives and U.S. Senators, LA. R.S. § 18:1271 provides:

> Except as otherwise specifically provided in this Part,

> United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

23. By operation of LA. R.S. § 1271, the following provision of the Louisiana Election Code is applicable to primary elections for U.S. Representative and U.S. Senator:

> Majority vote. *A candidate who receives a majority of the votes cast for an office in a primary election is elected.*

LA. R.S. § 18:511(A) (emphasis added). Thus, should a candidate for U.S. Representative or U.S. Senator in Louisiana secure a majority of the vote in the October open primary established by LA. R.S. §§ 18:1272(A), 18:1272(B), and 18:402(B)(1), under LA. R.S. §§ 18:1271 and 18:511(A) such candidate is "elected" and no election is conducted on Federal Election Day.

24. Pursuant to authority under Article II, § 1, cl. 2 of the U.S. Constitution enabling states to choose their own method of "appointing" Presidential Electors, Louisiana has enacted LA. R.S. § 18:1251, which provides for the popular election of Presidential Electors in Presidential election years. In accordance with the Congressional command in 3 U.S.C. § 1 that Presidential Electors be appointed on Federal Election Day, LA. R.S. § 18:1251 provides in pertinent part:

> The election [of Presidential Electors] *shall be held on the Tuesday following the first Monday in November....*

(emphasis added).

25. By permitting a candidate to win outright in the October open primary by securing a majority of the vote, Louisiana conducts binding and conclusive elections for U.S. Representative and U.S. Senator on the first Saturday in October. Only when the October open primary results in a failure to elect a

candidate to such offices does Louisiana, pursuant to LA. R.S. §§ 18:481, 18:1271, 18:1271(A) and 18:1272(B), conduct a run-off election on Federal Election Day between the candidates who receive the two highest numbers of votes in the primary.

Elections for U.S. Representatives in Louisiana, 1978-1994

26. Since Louisiana's open primary first took effect in federal elections in 1978, there have been seventy regular elections for U.S. Representative in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

27. Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested, i.e., only one candidate qualified for the open primary and therefore was declared elected without a contested primary election pursuant to LA. R.S. § 18:511(B).

28. Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary and thus held on such day when one candidate received a majority of the vote and therefore was elected outright pursuant to LA. R.S. §§ 18:1272(A), 18:402(B)(1), 18:1271, and 18:511(A).

29. Only nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the Federal Election Day when a failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election pursuant to LA. R.S. §§ 18:1272(A), 18:1271, and 18:481.

30. Of the fifty-seven contested regular elections for U.S. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the Federal Election Day.

Elections for U.S. Senator in Louisiana, 1978-1994

31. Since Louisiana's open primary first took effect in federal elections in 1978, there have been six regular elections for U.S. Senator from Louisiana. These elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

32. Five of the six contested regular elections for U.S.. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus were held on such day because one candidate received a majority of the vote and therefore was elected pursuant to LA. R.S. §§ 18:1272(B), 18:1271, and 18:511(A).

33. Only one of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on the Federal Election Day when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election pursuant to LA. R.S. §§ 18:1272(B), 18:1271, and 18:481.

Past and Future Injury to Plaintiffs Resulting from Louisiana's Violation of Federal Law Requirements for Timing of Congressional Elections

34. On October 6, 1996, pursuant to LA. R.S. §§ 18:402(B)(1), 18:1271, 18:1272(A), and 18:1272(B), Defendants will conduct open primary elections in Louisiana for Representatives from each Congressional District (including the Sixth and Third Congressional Districts) and U.S. Senator.

35. Should any candidate for U.S. Representative for the Sixth or Third Congressional Districts of Louisiana or U.S. Senator in the October 6, 1996 open primary win a majority of the vote, under LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271(A), and 18:1272(B), such candidate shall be elected, and Plaintiffs will be denied their right to vote for U.S. Representative or U.S. Senator on Federal Election Day, November 5, 1996.

36. On Federal Election Day, November 5, 1996, Defendants will conduct an election for Presidential Electors in Louisiana pursuant to LA. R.S. § 18:1251.

37. The right of each Plaintiff to vote for U.S. Representative and U.S. Senator on Federal Election Day is a right secured by the Constitution and laws of the United States, and the past and future denial of that individualized right is irreparable injury per se.

38. In previous Presidential election years, Plaintiffs have been injured by the Louisiana open primary system by being burdened with the requirement of voting in federal elections on two different days. Because the open primary forecloses an election on Federal Election Day if any candidate for U.S. Representative or U.S. Senator secures a majority of the vote, Plaintiffs have been and will be forced to vote in Louisiana's open primary to ensure that they will not be denied the opportunity to vote for U.S. Representative and U.S. Senator. Plaintiffs must then return to the ballot on Federal Election Day to vote for Presidential Electors. Under LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), this irreparable injury to Plaintiffs will be repeated in 1996 and all subsequent Presidential election years.

39. As a result of Louisiana's noncompliance with the federal timing requirement for congressional elections, Plaintiffs have in the past and will in the future suffer irreparable injury by being deprived of the right to participate in the political process and advocate the defeat or election of candidates for U.S. Representative and U.S. Senator during the time period between a conclusive primary for such offices and Federal Election Day.

COUNT I - DECLARATORY RELIEF

40. Plaintiffs reallege paragraphs 1-39 as if set forth here at length.

41. Plaintiffs' rights to vote in elections for U.S. Representative and U.S. Senator on Federal Election Day are privileges or immunities of U.S. citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

42. Plaintiffs' rights to vote in elections for U.S. Representative and U.S. Senator on Federal Election Day pursuant to 2 U.S.C. §§ 7 and 1 are federal statutory rights protected by the Supremacy Clause of Article VI of the U.S. Constitution.

43. Congress enacted 2 U.S.C. §§ 7 and 1 for the benefit of all voters, including Plaintiffs.

44. By providing for the conclusive election of a candidate for U.S. Representative and U.S. Senator in the October open primary, L.A. R.S. §§ 18;402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) allow Louisiana to circumvent the holding of regular congressional elections on Federal Election Day and deny Plaintiffs their rights to vote for U.S. Representative and U.S. Senator on such date. Accordingly, LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) violate 2 U.S.C. §§ 7 and 1 and as such are unconstitutional under the Supremacy Clause of Article VI of the U.S. Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

45. By conducting elections for U.S.. Representative and U.S. Senator in Louisiana in accordance with LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), Defendants under color of state law have in the past and will in the future violate the rights secured to Plaintiffs by the Constitution and laws of the United States to vote in congressional elections on Federal Election Day. the past violations and prospective future violations of Plaintiffs' rights to vote in congressional elections on Federal Election Day create a real and

justiciable controversy susceptible of resolution by declaratory judgment.

COUNT II - PERMANENT INJUNCTION

46. Plaintiffs reallege paragraphs 1-45 as if set forth here at length.

47. By conducting elections for U.S. Representative and U.S. Senator in Louisiana in accordance with LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), Defendants under color of state law have in the past and will in the future violate the rights secured to Plaintiffs by the Constitution and laws of the United States to vote in congressional elections on Federal Election Day.

48. Plaintiffs' rights to vote for a U.S. Representative and U.S. Senator on Federal Election Day are important rights, the deprivation of which denies each plaintiff the full scope of his or her individualized right to vote for a U.S. Representative or U.S. Senator. This deprivation of each Plaintiff's right to vote on Federal Election Day constitutes injury per se for which there is no adequate remedy at law.

49. By impairing the Plaintiffs' rights to vote for a U.S. Representative or U.S. Senator on Federal Election Day whenever a congressional candidate secures a majority of the votes case in Louisiana's open primary, Defendants directly and proximately have caused and will continue to cause irreparable injury to Plaintiffs for which there is no adequate remedy at law. Among other things, in Presidential election years Plaintiffs have been in the past and will be in the future burdened with the need to vote in regular federal elections on two different days, and Plaintiffs have been in the past and will be in the future deprived of the right to participate in the political process and advocate the defeat or election of candidates for U.S. Representative and U.S. Senator during the time period between a

conclusive primary for such offices and Federal Election Day.

50. It is in the public interest that Defendants be enjoined permanently from violating Plaintiffs' rights under 2 U.S.C. §§ 7 and 1 to vote for U.S. Representative and U.S. Senator on Federal Election day, because Plaintiffs' rights to vote on Federal Election Day are protected by the Supremacy Clause of Article VI of the U.S. Constitution and Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Fed. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be an "election" within the meaning of the 2 U.S.C. §§ 7 and because such primary allows the conclusive election of U.S. Representatives and U.S. Senators;

(b) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the Plaintiffs' rights to vote for U.S. Representative and U.S. Senator in regular congressional elections on Federal Election Day under 2 U.S.C. §§ 7 and 1 to be privileges of U.S. citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution;

(c) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be unconstitutional under the Supremacy Clause of Article VI of the U.S. Constitution by providing for the regular election of U.S. Representatives and Senators on a date earlier than that permitted by 2 U.S.C. §§ 7 and 1;

(d) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), and 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be unconstitutional under the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution because such primary denies the Plaintiffs their privilege as U.S. citizens to vote in regular congressional elections on Federal Election Day;

(e) Enter a permanent injunction pursuant to 28 U.S.C. § 2202, 42 U.S.C. § 1983, and FED. R. CIV. P. 65 enjoining Defendants from conducting the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), and requiring Defendants to conduct the 1996 and all future conclusive regular elections for U.S. Representative and U.S. Senator in Louisiana on Federal Election Day as designated by 2 U.S.C. §§ 7 and 1;

(f) Grant Plaintiffs their costs of this action and reasonable attorney fees pursuant to 42 U.S.C. § 1988; and

(g) Grant Plaintiffs such other relief as the Court deems just and equitable.

DATED: September 6, 1995 Respectfully submitted,

MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY

by: /s/ Thomas E. Balhoff
THOMAS E. BALHOFF (La. Bar No. 2716)
Judith R. Atkinson (La. Bar No. 17240)
Daniel J. Balhoff (La. Bar No. 18776) TA
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CARR, GOODSON & LEE, P.C.

by: /s/ M. Miller Baker
M. MILLER BAKER (La. Bar No. 14065)
Brian M. Tauscher
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(202) 310-5500

John S. Baker, Jr. (La. Bar No. 2700)
L.S.U. Law Center Room 414
Baton Rouge, Louisiana 70803
(504) 388-8846

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 6th day of September, 1995, that a copy of the foregoing pleading has been served by U.S. Mail, first class postage prepaid, or hand-delivery, upon the following counsel of record.

Roy A. Mongrue, Jr.
Angie R. LaPlace
Assistant Attorneys General
Civil Division
Post Office Box 94005
Baton Rouge, Louisiana 70804

Sheri Marcus Morris, Esquire
Office of the Secretary of State of Louisiana
Post Office Box 94125
Baton Rouge, Louisiana 70804-9125

/s/ Thomas E. Balhoff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, ET. AL, PLAINTIFFS

versus

EDWIN W. EDWARDS, ET. AL, DEFENDANTS.

ANSWER

NOW INTO COURT through undersigned counsel come defendants, EDWIN W. EDWARDS, in his offical capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of the State of Louisiana, who in answer to Plaintiffs' Complaint for Declaratory Relief and Permanent Injunctive Relief, as amended on September 6, 1995, asserts the following defenses.

FIRST DEFENSE

This court lacks subject matter jurisdiction.

SECOND DEFENSE

The complaint fails to state a cause of action or facts sufficient to constitute a claim upon which relief can be granted.

THIRD DEFENSE

Defendants futher answer the complaint as follows:

1. The allegations contained in paragraphs 1 and 2 are conclusions of law which do not require an answer; alternatively, the allegations are denied.

2. The allegations contained in paragraphs 3, 4, 5 and 6 are denied for lack of sufficient information to justify belief therein.

3. The allegations contained in paragraph 7 are admitted.

4. The allegations contained in paragraph 8 are admitted with the exception that W. Fox McKeithen is not a resident of East Baton Rouge Parish.

5. The allegations contained in paragraphs 9, 10, 11 and 12 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

6. The allegations contained in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

7. The allegations contained in paragraphs 24, 25 and 26 are denied.

8. The allegations contained in paragraphs 27, 28, 29 and 30 are conclusions of law and do not require an answer; alternatively, the allegations are denied for lack of sufficient information to justify a belief therein.

9. The allegations contained in paragraph 31 are denied for lack of sufficient information to justify a belief therein.

10. The allegations contained in paragraphs 32 and 33 are conclusions of law and do not require an answer; alternatively, the allegations are denied for lack of sufficient information to justify a belief therein.

11. The allegations contained in paragraph 34 are admitted.

12. The allegations contained in paragraph 35 are conclu-

sions of law and do not require an answer; alternatively, the allegations are denied.

13. The allegations contained in paragraph 36 are admitted.

14. The allegations contained in paragraph 37, 38 and 39 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

15. Defendants adopt their responses to paragraphs 1-39 as if set forth here at length in respose to the allegations contained in paragraph 40.

16. The allegations contained in paragraph 41, 42, 43, 44 and 45 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

17. Defendants adopt their responses to paragraphs 1-45 as if set forth here at length in respose to the allegations contained in paragraph 46.

18. The allegations contained in paragraph 47, 48, 49 and 50 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

WHEREFORE, defendants EDWIN W. EDWARDS, in his offical capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of the State of Louisiana, pray that this answer be deemed good and sufficient and that after due legal proceedings are had, plaintiffs' complaint be dismissed at plaintiffs' cost, with prejudice.

RESPECTFULLY SUBMITTED:

RICHARD P. IEYOUB
ATTORNEY GENERAL

/s/ Angie Rogers Laplace

Roy A. Mongrue, Jr., #9549
Angie Rogers Laplace, #19669

LOUISIANA DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. Box 94005
Baton Rouge, LA 70804-9005
(504) 342-7013

Counsel for Edwin W. Edwards, Governor

/s/ Sheri M. Morris
Sheri Marcus Morris #20937
Counsel for W. Fox McKeithen
Secretary of State
P.O. Box 94125
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(504) 342-2065

CERIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18th, 1995, I served a true and correct copy of the foregoing by U.S. Postal Service to the following counsel:

Thomas E. Balhoff
Judith R. Atkinson
Daniel J. Balhoff
MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY
320 Somerulos Street
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John S. Baker, Jr.
L.S.U. Law Center Rm. 414
Baton Rouge, LA 70803

/s/ Angie Rogers Laplace
ANGIE ROGERS LAPLACE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

v.

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, by counsel, pursuant to ULLR Rule 2.09 and in support of their Motion for Summary Judgment, submit the following statement of material facts as to which there is no genuine issue to be tried:

1. Plaintiff G. Scott Love is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Love is a registered voter who resides in the Sixth Congressional District of Louisiana. Love has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of G. Scott Love (attached hereto as Exhibit A).

2. Plaintiff Paul S. Bergeron is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish,

Louisiana. Bergeron is a registered voter who resides in the Sixth Congressional District of Louisiana. Bergeron has voted in the previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Paul S. Bergeron (attached hereto as Exhibit B).

3. Plaintiff Kathleen B. Balhoff is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Balhoff is a registered voter who resides in the Sixth Congressional District of Louisiana. Balhoff has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Kathleen B. Balhoff (attached hereto as Exhibit C).

4. Plaintiff Bennie Baker-Bourgeois is a citizen of Louisiana and of the United States who resides in Lafourche Parish, Louisiana. Baker-Bourgeois is a registered voter who resides in the Third Congressional District of Louisiana. Baker-Bourgeois has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Bennie Baker-Bourgeois (attached hereto as Exhibit D).

5. Defendant Edwin W. Edwards is Governor of the State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to Article IV, § 5 of the Louisiana Constitution, Edwards is responsible for executing the laws of Louisiana.

6. Defendant Fox McKeithen is Secretary of State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to La. R.S. § 18:421, McKeithen is the chief

election officer of Louisiana. Pursuant to La. R.S. § 18:1277, McKeithen is also responsible for certifying the results of congressional elections.

7. Since the open primary first took effect in Louisiana federal elections in 1978, there have been seventy regular elections for U.S. Representative held in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

8. Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested when only one candidate qualified for the open primary and was thereby declared elected without a contested primary election.

9. Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected outright.

10. Nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the Federal Election Day in November when the failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election.

11. Of the fifty-seven contested regular elections for U.S.. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the Federal Election Day in November.

12. Since the open primary first took effect in Louisiana federal elections in 1978, there have been six regular elections for U.S. Senator held in Louisiana. these elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

13. Five of the six contested regular elections for U.S. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected.

14. One of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on the Federal Election Day in November when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election.

DATED: September 5, 1995 Respectfully submitted,

MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY

by: /s/ Thomas E. Balhoff
THOMAS E. BALHOFF (La. Bar No. 2716)
Judith R. Atkinson (La. Bar No. 17240)
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CARR, GOODSON & LEE, P.C.

by: /s/ M. Miller Baker
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(504) 388-8846

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 5th day of September, 1995, that a copy of the foregoing pleading has been served by U.S. Mail, first class postage prepaid, or hand-delivery, upon the following counsel of record.

Roy A. Mongrue, Jr.
Angie R. Laplace
Assistant Attorneys General
Civil Division
Post Office Box 94005
Baton Rouge, Louisiana 70804

Sheri Marcus Morris, Esquire
Office of the Secretary of State of Louisiana
Post Office Box 94125
Baton Rouge, Louisiana 70804-9125

/s/ Thomas E. Balhoff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, ET AL, PLAINTIFFS

versus

EDWIN W. EDWARDS, ET AL, DEFENDANTS.

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Defendants, Edwin Edwards, Governor of the State of Louisiana and W. Fox McKeithen, Secretary of State of Louisiana, through undersigned counsel, pursuant to ULLR 29 and in support of their Motion for summary Judgment, submit the following statement of material facts as to which there is no genuine issue to be tried:

1. Requiring the state of Louisiana to place an unopposed candidate for office on the ballot for election will result in unnecessary expense to the State of Louisiana, and an unnecessary depletion of the public fisc, and will needlessly cause electors to cast meaningless votes.

2. Louisiana's open primary procedure for conducting elections in the state of Louisiana has received the requisite preclearance by the United States Attorney General.

3. The state of Louisiana has held elections on the first Tuesday following the first Monday in November, 1982 and every two years thereafter whenever more than one candidate for

U.S. Senator or U.S. Representative was qualified to run in that election.

Respectfully submitted,

Richard P. Ieyoub
Attorney General of Louisiana

/s/ Angie Rogers Laplace
ANGIE ROGERS LAPLACE
Assistant Attorney General
Bar Roll No. 19669
/s/ Roy A. Mongrue, Jr.
ROY A. MONGRUE, JR.
Assistant Attorney General
Bar Roll No. 9549
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon opposing counsel of record by depositing the same in the United States Mail, postage prepaid, and properly address, this 4th day of October, 1995.

/s/ Roy A. Mongrue, Jr.
ROY A. MONGRUE, JR.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NUMBER: 95-788-B-M1

G. SCOTT LOVE, ET AL.

v.

EDWIN W. EDWARDS, ET AL.

PLAINTIFFS' STATEMENT OF DISPUTED MATERIAL FACTS / RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

NOW INTO COURT, through undersigned counsel, come plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, and submit the following responses to defendants' Statement of Material Facts as to Which There is No Genuine Issue to be Tried:

1. Admitted.

2. It is admitted that the United States Attorney General has precleared elections pursuant to the voting Rights Acts, but it is not admitted that said preclearance bears upon Louisiana's compliance or noncompliance with the Federal Election Day Statutes.

3. Denied. Defendants' statement appears to imply that there is a November election whenever more than one candidate "qualifies." This is not true, unless by "qualifies" defendants mean that a candidate was one of the top two contenders

in the October election, and no candidate received more than 50% of the vote in the October election.

Respectfully Submitted:

MATHEWS, ATKINSON, GUGLIELMO,
MARKS & DAY
320 Sumerulos Street
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(504) 387-6966

by: /s/ Daniel J. Balhoff
THOMAS E. BALHOFF (2716)
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John S. Baker, Jr. (2700)
L.S.U. Law Center, Room 414
Baton Rouge, Louisiana 70803
(504) 388-8846

CERTIFICATE

I hereby certify that a copy of the foregoing was this hand delivered to:

Sheri Marcus Morris, Esq
Office of the Secretary
of State of Louisiana
19th Floor, State Capitol
900 Riverside North
Baton Rouge, LA 70802

Roy A. Mongrue, Jr., Esq.
Angie R. LaPlace
Assistant Attorneys General
Civil Division
301 Main Street, 6th Floor
One American Place
Baton Rouge, LA 70801

Baton Rouge, Louisiana, this 17th day of October, 1995.

/s/ Daniel J. Balhoff
DANIEL J. BALHOFF

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF KATHLEEN BRADY BALHOFF

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Kathleen Brady Balhoff, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information contained in the affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by the Louisiana law exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Kathleen Brady Balhoff
KATHLEEN BRADY BALHOFF

Subscribed and sworn to before me this 4th day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF GLEN SCOTT LOVE

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Glen Scott Love, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by Louisiana law from exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Glen Scott Love

GLEN SCOTT LOVE

Subscribed and sworn to before me this 3rd day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS

Plaintiffs

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA

DEFENDANTS

AFFIDAVIT OF BENNIE BAKER-BOURGEOIS

I, Bennie Baker-Bourgeois, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in Lafourche Parish, Louisiana. As a resident of Lafourche Parish, I am represented by the U.S. Representative elected from the Third Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Third Congressional District, I did not vote in the October open primary in which Billy Tauzin received a majority of the vote and was thereby elected outright under Louisiana law. I was therefore prevented by the Louisiana law from exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

6. In the 1992 elections for U.S. Representative from the Third Congressional District and U.S. Senator from Louisiana, I voted in the October open primary which resulted in the conclusive elections of Billy Tauzin as U.S. Representative and John Breaux as U.S. Senator. I returned to the polls on the Federal Election Day in November 1992 to vote for Presidential Electors. Louisiana law thus burdened me with the necessity to vote on two different days in the 1992 regular federal elections of Louisiana.

7. In the 1990 elections for U.S. Representative from the Third Congressional District and U.S. Senator from Louisiana, I did not

vote in the October open primary in which Billy Tauzin received a majority of the vote for U.S. Representative and Bennett Johnston received a majority of the vote for U.S. Senator, resulting in the outright election of both under Louisiana law. I was therefore prevented by Louisiana law from exercising my right under the Constitution and federal law to vote in the election for U.S. Representative and U.S. Senator on the Federal Election Day in November 1990.

8. Because the 1990, 1992, and 1994 election campaigns for U.S. Representative from the Third District, and the 1990 and 1992 election campaign for U.S. Senator from Louisiana all terminated prematurely in the October open primary, I was deprived of my rights to participate in the political process and advocate the election or defeat of candidates for such offices during the period between the October open primary and the Federal Election Day in these election years.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Bennie Baker-Bourgeois
BENNIE BAKER-BOURGEOIS

PARISH OF LAFOURCHE
STATE OF LOUISIANA

Subscribed and sworn to before me this 31st day of August, 1995.

/s/ Margaret Smith Sallors
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF PAUL S. BERGERON

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Paul S. Bergeron, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information contained in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Represen-

tative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Sixth Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by the Louisiana law exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Paul S. Bergeron
PAUL S. BERGERON

Subscribed and sworn to before me this 26th day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiffs dismissing this suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

/s/ Frank J. Polozola
FRANK J. POLOZOLA

United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA

RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. the Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

Therefore:

IT IS ORDERED that the defendants' motion for summary judgment be and it is hereby **GRANTED.**

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment be and it is hereby **DENIED.**

Judgment shall be entered dismissing the plaintiffs' suit with prejudice.

Baton Rouge, Louisiana April 11, 1996.

/s/ Frank J. Polozola
FRANK J. POLOZOLA

United States District Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

(Filed July 30, 1996)

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Respondents,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF THE STATE OF TLOUISIANA, and FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Before DAVIS and DENNIS, Circuit Judges, and FALLON*, District Judge.

DAVIS, Circuit Judge:

Respondents, four Louisiana voters, appeal from the district court's order granting defendants' motion for summary judgment and dismissing plaintiffs' suit seeking declaratory and injunctive relief on grounds that Louisiana's method of conducting congressional elections violates the Constitution and laws of the United States. We reverse.

*District Judge of the Eastern District of Louisiana, sitting by designation.

I.

In August 1995 four Louisiana citizens, who are registered to vote in Louisiana and who have a history of voting in congressional elections, filed this action for declaratory and injunctive relief. They seek this relief under 42 U.S.C. s 1983 and pursuant to our federal question jurisdiction to resolve a Constitutional claim. Their core allegation is that the Louisiana open primary system violates the federal statutes that establish a uniform federal election day for members of Congress and must yield under the Supremacy Clause of the Constitution. After crossmotions for summary judgment were filed, the district court granted summary judgment for the defendants. The respondents filed a timely appeal.

II.

We review a district court's grant of summary judgment de novo. *Mozeke v. International Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). In deciding this appeal, we address only the pre-emption claim. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

In *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), the Supreme Court summarized the theories under which state laws are preempted as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal

> law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id. at 368-69, 106 S.Ct. at 1898-99 (internal citations omitted).

We start our pre-emption analysis from the bedrock premise that Congress has authority to enact the requirements for federal elections. Article I, Section 4, Clause 1 of the Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

In *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), the Court, interpreting Art. I, § 4, Cl. 1, stated that "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration,...." Id. at 366, 52 S.Ct. at 399.

In 1872, Congress established a uniform election day for elections for U.S. Representatives by enacting 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the

> Congress commencing on the 3d day of January next thereafter.

This same election day was later adopted for elections for U.S. Senators in 2 U.S.C. § 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

Congress also set this day for the election of presidential electors. 3 U.S.C. §1. [1]

Congress in 2 U.S.C. §§ 1, 7 therefore declared that all elections for Congress should be held on the same date, the Tuesday following the first Monday in November (federal election day). This declaration was subject to only two exceptions: (1) in states that required a majority vote for election, a runoff could be held between federal election day and January when officials take office; and (2) an election could be held on a different date if a vacancy occurred in the office. 2 U.S.C. § 8. [2] In adopting this scheme, Congress precluded a state from hold-

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[1] 3 U.S.C.§1 states:
The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

[2] 2 U.S.C. § 8 states:
The time for holding elections in any State, District, or Territory

ing an election in which members of Congress could be elected before the federal election date.

This interpretation is supported by the legislative history. This history indicates that Congress wanted a uniform election day to prevent earlier elections in some states unduly influencing the later voters, to prevent fraudulent voting in multiple state elections, and to remove the burden of voting in more than one federal election in a given year. Cong.Globe, 42d Cong., 2d Sess. 112 (1871).[3]

The legislative history of 2 U.S.C. § 8 also supports the conclusion that Congress intended any outcome determinative election to be held on federal election day unless it fell within the exception in § 8. During the consideration of § 8, Senator

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for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

[3] Mr. Butler who introduced the amendment stated the following reasons:

> But on account of the facility for colonization and repeating among the large central States, New York holding its election in November, and Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. I think it will be fair for everybody that on the day when one votes all should vote, and that the whole question should be decided then. Again, there is another and a different question. Every fourth year many of the States have to hold two elections: one for the State on one day, and one for

Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect*. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a vacancy, and *still more seldom that there is a failure to elect*. In all those States in which a plurality elects, no such thing as failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot. . . .

> the electors of President and Vice President on another day. This throws a great burden needlessly and uselessly, it seems to me, upon the people, and I move this for the purpose of having a uniform election to take place in the future at a time when all the State constitutions as to State elections may be conformed to it.

Cong.Globe, 42d Cong., 2d Sess. 112 (1871).

On a different day, Mr. Butler reintroduced this amendment and stated:

> Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some States undue advantage. It gives some parties undue advantage.... But what I contend is that is an undue advantage, that it is a wrong, and it is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work, to say nothing of the expenses which fall on the politicians, and are of no very great consequence one way or the other. Cong.Globe, 42d Cong., 2d Sess. 141 (1871).

> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number.* Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

Cong.Globe, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

For all of the above reasons, we conclude that Congress intended that all determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8.

We turn next to the Louisiana election scheme which respondents contend conflicts with 2 U.S.C. §§1, 7. Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes. The pre-1978 Louisiana law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. *See* La.Rev.Stat. § 18:546 (now repealed).

In 1978, Louisiana drastically changed its method for selecting federal and state officials by adopting an open primary system. Under this system, all candidates, regardless of party

affiliation, appear on the same ballot and all voters regardless of party affiliation may vote for the candidate of their choice. La.Rev.Stat. § 18:401(B). [4]

This open primary is ordinarily [5] held "on the first Saturday in October next preceding the date of the general election." La.Rev.Stat. § 18:1272(A). [6] *See also* La.Rev.Stat. § 18:1272(B). To win in the October primary, a candidate must receive a majority of the votes cast. Louisiana holds its general election on the federal election day. *Id.* But the names of congressional candidates (like candidates for statewide office) only appear on the general election ballot if no single candidate receives a majority of the votes in the primary and a runoff between the two top candidates is required. La.Rev.Stat. § 18:1271. [7]

Thus the Louisiana open primary system allows contested

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[4] La.R.S. § 18:401(B) states:
B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

[5] The primary is scheduled for September 21 this year because October 5 is a religious holiday.

[6] La.R.S. § 18:1272(A) states:
A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

[7] La.R.S. § 18:1271 states:

elections for Congress to be decided in the primary, which is held at least one month before the general election. This is the portion of the Louisiana election scheme that respondents contend is in conflict with 2 U.S.C. §§ 1, 7. The Louisiana election code provides that: "A candidate who receives a majority of the votes cast for an office in a primary election is elected." La.Rev.Stat. § 18:511(A). When the seat in Congress is filled in the October primary, no candidate's name appears on the ballot in the November general election and no vote for that office can be cast on the federal election date. In fact, since 1978 over 80% of the contested congressional elections have been decided in the October primary. Only nine of fifty-seven contested elections for U.S. Representatives and one of six contested elections for U.S. Senator had candidates placed on the general election ballot for November.

Respondents argue that the 2 U.S.C. §§ 1, 7 sets the earliest day that a state may hold a contested election for Congress where the winner may be determined. Respondents contend that the Louisiana election system conflicts with this provision by allowing such an election at an earlier date.

Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a]

Except as otherwise provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

candidate who receives a majority of the votes cast for an office in a primary election *is elected.*" La.R.S. § 18:511(A) (emphasis added).

We agree with respondents that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters. Thus, the Louisiana system as applied to federal elections must yield under the Supremacy Clause.

III.

[4] Having decided that the Louisiana open primary election scheme conflicts with 2 U.S.C. §§ 1, 7, we now turn to a consideration of the appropriate remedy.

Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law. See *Frost v. Corporation Common*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). This drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago.

In exercising our discretion in granting or withholding an injunction we balance "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944).

Courts should be particularly loathe to preempt a state legislative task such as establishing an election scheme. Even in reapportionment cases where the voters' Fourteenth Amendment rights to equal protection is infringed, federal courts fre-

quently give the state an opportunity to remedy the defect before fashioning a judicial remedy. *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir.1991); *Mississippi State Chapter, Operation Push, Inc., v. Mabus*, 932 F.2d 400 (5th Cir.1991).

In addition to this federalism concern, a number of additional factors weigh against the issuance of an injunction: (1) The campaign for statewide and federal offices for the September 21 open primary election is well under way. Qualification date for candidates for those offices closed on Friday, July 12, 1996. Enjoining that election would be expensive for the candidates and the State. Ordering another election at a different time would also be confusing to the voters. (2) By contrast, the injury to the plaintiffs will be relatively minimal. To be assured of participating in the election of their representatives and senators, plaintiffs must vote on September 21. But they have the right to vote in those elections on that date and if they do so, their vote will count. If plaintiffs' representatives and senators are elected on September 21, they will be required to return to the polls on November 5 to vote in the presidential election. However, compared with the cost of enjoining the September 21 election, two trips to the polls is a relatively minor cost.

CONCLUSION

For the reasons discussed above, we conclude that plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day. The next scheduled session of the Louisiana legislature is in May 1997. We remand this case

to the district court with directions to reconsider plaintiffs' request for injunctive relief if the state has not acted to resolve the conflict within a reasonable time after the 1997 legislative session. We also remand all remaining issues in this case to the district court. [8]

REVERSED and RENDERED.

DENNIS, Circuit Judge, dissenting:

Article I, Section 4, Clause 1 of the United States Constitution establishes the power and the duty of each state legislature to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to the power of the Congress to "at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Thus, except to the extent that Congress acts to change or supplement state laws, the States retain broad authority to regulate elections under the Times, Places and Manner Clause. It cannot be doubted that the Clause invests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[ ]." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795 (1932).

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[8] We decide this case under our federal question jurisdiction to resolve a claim under the Supremacy Clause. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983). The issues not considered in this opinion include whether plaintiffs have stated a claim for a violation of the Privileges and Immunities Clause of the Fourteenth Amendment and whether plaintiffs have stated a claim enforceable under 42 U.S.C. § 1983.

This view is confirmed by the second clause of article 1, § 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It "has a general supervisory power over the whole subject." [Citations omitted.] But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making "such regulations"; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.

Id. at 366-367, 52 S.Ct. at 399. *See also, Roudebush v. Hartke,* 405 U.S. 15, 24-25, 92 S.Ct. 804, 810-11, 31 L.Ed.2d 1 (1972); ("Unless Congress Acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections."); *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) ("[ ] Art I, § 4, cl 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' "); *United States v. Classic,* 313 U.S. 299, 311, 61 S.Ct. 1031, 1035-36, 85 L.Ed. 1368 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.")

Congress, in deference and respect to the states, has been slow to exercise the powers expressly conferred upon it in re-

lation to elections by the fourth section of the first article of the Constitution. See, "The Ku-Klux Cases." *Ex Parte Yarbrough et al.,* 110 U.S. 651, 660-662, 4 S.Ct. 152, 156- 58, 28 L.Ed. 274 (1884). It was not until 1842 that Congress took any action under the Times, Places and Manner Clause by providing that each member of Congress should be elected by a separate district, composed of contiguous territory. 5 St. 491. *Id.* Thirty years afterwards, in an act to apportion representatives to Congress among the several states according to the ninth census, Congress provided for the first time a regulation for the time of holding elections of representatives. The Act of Feb. 2, 1872, ch. 11. §§ 3 and 4, 17 Stat 28, 29, in pertinent parts, provides:

> Sec. 3. That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is hereby fixed and established as the day for the election, in each of said States and territories, of Representatives and delegates to the Congress commencing on the fourth day of March next thereafter.
>
> Sec. 4. That if, upon trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day here by fixed and established for such election, or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, an election shall be held to fill any vacancy caused by such failure,

> resignation, death, or otherwise, at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur.

In substance, the same provisions have been continued in the present federal statutes regulating the time of holding elections for Representatives. 2 U.S.C. § 7 provides that the Tuesday next after the first Monday in November, in every even numbered year, is established as the day for the election in each of the states and territories. 2 U.S.C. § 8 provides that the time for holding elections for Representative to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several states and territories respectively.

The Louisiana laws prescribing the times, places and manner of holding elections for Senators and Representatives provide for "open" primary and general elections. All qualified voters may vote for candidates in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it. La.R.S. 18:401(B). The times for the elections are fixed as follows: (a) The primary election is held on the first Saturday in October next preceding the date of the general election, La.R.S. 18:1272(A); and (b) the general election is held on the Tuesday next after the first Monday in November in every even numbered year, i.e., on the federal election day. La.R.S. 18:1272(B). The Louisiana laws also provide that a candidate who receives a majority of the votes cast in the primary election "is elected." La.R.S. 18:511(A).

The plaintiffs contend that the Louisiana election laws are

unconstitutional because they (a) allow a possibility that a candidate for Representative will be elected by receiving a majority of votes in the primary election; (b) and are thus contrary to the federal statute which requires that a Representative be elected on the federal election day, which Louisiana designates as the general election day.

The Supremacy Clause, Art. V, cl. 2 of the United States Constitution, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The United States Supreme Court has developed a doctrine of preemption for deciding when a state law or constitution, in whole or in part, is "contrary" to the United States Constitution, or a valid federal law or treaty, made in pursuance thereof, that requires the state provision to yield to the federal. The principal precepts comprising this doctrine were summarized recently by the court in *Northwest Central Pipeline Corporation v. State Corporation, Commission of Kansas*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989):

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regu-

lation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

Applying the preemption precepts to the Louisiana laws prescribing the times, places and manner of electing Representatives, it is clear that, under the supremacy clause, the state's laws are not contrary to the federal statutes that partially regulate the same subjects. Obviously there is no explicit statutory language signaling an intent to pre-empt, and we cannot infer an intention to occupy the entire field of election regulation because Congress has not legislated comprehensively on the subject. The plaintiffs present no argument to this effect but contend that the state law at issue conflicts with the federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

In order to demonstrate that it is impossible to harmonize

or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of the those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day. The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. See majority opinion p. 5, n. 3, and p. 6. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday

in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day. [1] The plaintiffs have not supplied any statistics by which we may compare the open primary to the party primary and other systems. However, during the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence the party primary system probably resulted proportionately in even fewer actual

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[1] For much of the history of the electoral party primary, Louisiana, like the rest of the South, was a one-party state in which general elections meant little. Paul Grosser, "Political Parties." LOUISIANA POLITICS; FESTIVAL IN A LABYRINTH 257 (1982). See also, *United States v. Classic*, 313 U.S. 299, 314 n. 2, 61 S.Ct. 1031, 1037 n. 2, 85 L.Ed. 1368 (1941). "Since the end of Reconstruction, the Republican party in Louisiana had served as little more than a nominal element in state politics. The domination of the Democratic party was so pervasive that victory in a Democratic primary invariably meant election." Bennett Wall, LOUISIANA: A HISTORY 2nd Ed. 362 (1990). The Republicans only fielded candidates on an "episodic" basis, and did not elect a member of Congress (after Reconstruction) until 1972. Grosser, *supra* at 257-8. During all of those decades in which many states held general elections which were often uncontested and usually mere formalities, Congress never chose to act to require the de facto determinative election to be held on federal election day.

contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Supreme Court observed:

> Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.
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> * * *
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> [T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

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[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives

* * *

> Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. . . .

Id. at 311, 313-314, 318-319, 61 S.Ct. at 1035-36, 1036-37, 1039.

Nevertheless, the plaintiffs concede that "[p]rior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Respondents' Brief at p. 32. Accordingly, they argue that this court should strike down the open primary law as it applies to Congressional elections and "revive Louisiana's pre-1978 election system for Congressional elections to the extent practicable because the pre-1978 election system is 'the only valid expression of the legislative intent.' Frost, 278 U.S. at 526-27, 49 S.Ct. at 239." *Id.* This concession and Congress's refusal during the past century to abolish or alter state party primary regulations casts grave doubt on Respondents' argument that it was Congress's intent by the Federal Election Day laws to insure that contested Congressional elections, or the opportunity to qualify for them, take place in every district on each federal election day. Because it is upon this erroneous interpretation of the Federal Election Day laws that respondents

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(1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

rely to show that the state's open election laws are contrary thereto and that it is impossible to comply with both, their argument in this respect is without merit.

Appellants and the majority find significance also in the fact that La.R.S. 18:511(A) provides that "[a] candidate who receives a majority of the votes cast for an office in a primary election is elected." Because the Federal Election Day laws do not necessarily preclude a candidate from being declared elected after receiving a majority of the votes in the open primary, I do not believe this provision is contrary to the federal law. However, if the majority concludes that this provision alone prevents the open elections laws from passing Supremacy Clause muster, it would be a simple matter for this court to enjoin such a declaration that a congressional candidate is elected until the federal election day, rather than declaring the whole law unconstitutional in its application to Congressional elections.

Nor is the state's open elections law contrary to the Federal Election Day laws because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. 2 U.S.C. § 7 was enacted, the Supreme Court has observed, "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough,* 110 U.S. 651, 661, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884). But those evils unduly benefiting certain states and political parties and unnecessarily burdening voters and politicians, Cong. Globe, 42nd Cong., 2d Sess. 141 (1871) (remarks of Senator Butler), are not perpetuated by the current state open elections laws any more, if at all, than by the previous party primary laws that respondents wish us to revive. As noted above, the legislative history indicates that

the evil perceived by Congress at that time was the unbridled power of the states to independently arrange their election dates in a haphazard and pernicious manner completely untethered to a federally prescribed national election day. Although the present law does impose the burden of double elections on employed voters, so did the old party primary law and so does virtually every other election system. The passage of time, however, "has mitigated those burdens to the extent that "the poor laboring man" no longer "loses his day's work" by going to the polls." *Id. See Busbee v. Smith*, 549 F.Supp. 494, 524 (D.D.C.1982). Improvements of registration and election laws have greatly reduced the danger of a voter crossing state lines to vote in more than one Congressional district election. The advent of polling coupled with the instantaneity of modern media coverage has largely superceded whatever effects the outcome of a congressional primary in one state may have on an election in another.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Appellants,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF THE STATE OF LOUISIANA, and FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

RULING ON PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

(Filed November 15, 1996)

Before DAVIS, DENNIS and FALLON[1], District Judge.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. Judge Dennis would grant rehearing for reasons stated in his dissent. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, the Petition for Rehearing En Banc is DENIED.

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1. District Judge of the Eastern District of Louisiana, sitting by designation.

In response to the petition for rehearing, we make it clear that all we hold is that Louisiana's election plan, to the extent it precludes any legal election for United States Representatives and Senators on Federal Election Day, conflicts with 2 U.S.C. §§1 and, 7 and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on Federal Election Day and provide for a runoff election between November and January when the elected member of Congress takes office. *See* 2 U.S.C. § 8.

DENNIS, Circuit Judge, with whom POLITZ, Chief Judge and SMITH, Circuit Judge join, dissenting from failure to grant rehearing en banc.

I respectfully dissent from the court's failure to grant rehearing en banc because (1) the panel majority erroneously declared a state statute preempted by a federal law due to its failure to correctly apply the controlling Supreme Court precedents regarding federal preemption; and, (2), even as supplemented by per curiam, the panel opinion should be clarified and limited because it casts doubt on the constitutionality of all other state primary election systems.

1. The state statute should be upheld under a correct preemption analysis. The consideration of whether a state law is contrary to the Constitution or a federal law and must, therefore, yield under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (citation omitted) ("'[T]he historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'"). Accordingly, the party claiming preemption has the burden of proof, *see* 2 Rotunda &

Nowak, *Treatise on Constitutional Law* § 12.4 at 90 (2d ed. 1992), and must persuade the court that preemption is proper in one of several ways.

"First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 496 U. S . 72, 78 - 79 (1990)(citations omitted).

"Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject' . . . . [However], '[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be '"clear and manifest."'" *Id.* at 79.

"Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption [1] where it is impossible for a private party to comply with both state and federal requirements, or [2] where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

The plaintiffs, G. Scott Love and others, failed to overcome the presumption that "Congress did not intend to displace state law[,] " *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) . Nor did they carry their burden of proof to show that preemption is proper in one of the prescribed ways.

The plaintiffs correctly, although tacitly, conceded that Congress did not insert specific preemptive language into the federal election day law that explicitly preempted Louisiana's power to regulate Congressional elections. Nor did they base their argument on a field preemption rationale. Moreover, it is evident there was no "clear and manifest" intent on the part of Congress to displace the states' historic function of conducting and regulating Congressional elections. As the Supreme Court in *Storer v. Brown,* 415 U.S. 724, 729-730 (1974) recognized:

> [U]nder our Constitution . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art I, §2, cl 1. Also Art I, § 4, cl 1, authorizes the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Furthermore, the plaintiffs did not contend, and the panel majority did not decide, that the state election law actually conflicts with the federal election day law for the first reason that a state law can be conflict-preempted; i.e., that it is impossible for a private party to comply with both state and federal requirements. The federal election day law applies to the states, not individuals, and therefore places no requirements

upon private parties that might conflict with regulation of their conduct by the state.[1]

The issue of preemption under the Supremacy Clause is narrowed then to this: Does the state statute "actually conflict" with federal law because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"?

It is not disputed that the main purpose of the federal law, as clearly demonstrated by its text and legislative history, is to

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1. Two cases in which that conflict theory was argued but rejected further demonstrate its irrelevance here. In *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963), the case usually cited for the first conflict-preemption rule, the Supreme Court observed that "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." In that case, the Supreme Court concluded that no federal-state law conflict existed where federal marketing orders forbidding the picking and shipping of South Florida avocados before a certain date do not render invalid, on the ground of impossibility of dual compliance, a California statute prohibiting the sale of avocados containing less than 8 percent of oil, by weight, excluding the skin and seed, where Florida avocados marketed in California attain or exceed 8 percent when in prime commercial marketing condition, and Florida growers may avoid rejection of their avocados in California by leaving them on the trees beyond the earliest picking date set by the federal orders. Thus, the Court concluded that the present record demonstrated no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards. *Id.* at 142-143. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238(1984), the Supreme Court held that a state law authorizing award of punitive damages was not pre-empted by the Atomic Energy Act. The Court concluded that the award of punitive damages did not conflict with the federal remedial scheme under which the NRC is authorized to impose civil penalties on licensees for violation of federal standards because paying both federal fines and state-imposed punitive damages for the same incident is not physically impossible and exposure to punitive damages does not frustrate any purpose of the federal remedial scheme.

establish the federal election day to restrict the states' original powers to conduct Congressional elections in different, dispersed months of the year. Congress feared that, without a federally prescribed benchmark, there could be undue influence upon election results by states' strategic timing of elections and unscrupulous individuals "throwing voters" from one state to another; and that voters would be burdened with double elections in Presidential election years.

The plaintiffs concede that the traditional partisan state primary systems, such as Louisiana's pre-1978 system, do not actually conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[2] They admit this even though they also acknowledge that state partisan primary systems frequently determine the outcome of congressional elections prior to the federal election day.[3] The crucial distinction between the partisan primary system and Louisiana's current open primary system for preemption purposes, they contend, however, is that while partisan primary elections may be determinative *de facto*, they are not conclusive *de jure*, because it is usually theoretically possible under such state laws for a non-primary candidate to get on the general election ballot on federal election day through nomination papers or write-in procedures. *See* Appellants' Brief at 10 and Reply Brief at 6.

2. "Prior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Appellants' Brief at 32; "Primary elections, partisan or otherwise, in advance of Federal Election Day ballot are permissible under the Federal Election Day Statutes so long as such 'primaries' are not conclusive *ipso jure*." *Id.* at 17.

3. "The [appellants] do not dispute that where only *one* candidate 'qualifies' for U.S. Representative or U.S. Senator in the sense of timely filing the appropriate candidacy papers and otherwise meeting the relevant age and residence requirements, that candidate is indeed "unopposed" on the Federal Election Day ballot, and the State is not required to place such candidate's name on the Federal Election Day ballot." Appellants' Reply Brief at 6.

See also United States v. Classic, 313 U.S. 299, 311 (1941): "In common with many other states Louisiana has exercised [its] discretion [under §2 of Article I of the Constitution] by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary."

The plaintiffs fail to demonstrate, however, that the Louisiana open primary law hinders the accomplishment of the purpose of the federal election day law. Certainly, they have not shown that it does so any more than Louisiana's former party primary law or other typical partisan primary systems. Neither the Louisiana open primary system nor the typical partisan primary system frustrates the federal statute's goal of controlling and containing the power of the states to independently arrange congressional elections by requiring that they be tied to a common termination date. Nor does either primary system present an obstacle to the federal objective of guarding against "throwing voters" from state to state. The open primary does not hinder, any more than the partisan primary, the federal objective of elimination of unnecessary elections and undue influence due to the timing of elections. The text and the legislative history of the federal statute do not reveal a clear congressional purpose to oust or displace state powers to enact state open primary systems or partisan primary systems that use the federal election day as the general election date. The most plausible inference from the federal law establishing the federal election day is that Congress did not contemplate that state power to enact any reasonable primary system incorporating the federal election day would be impaired.

Because the Supreme Court is "generally reluctant to infer

preemption," *e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978), and cases cited therein, Congress must speak clearly and make its intention to preempt unmistakable.

Under the standard applicable here, there is no "actual conflict" unless the state law frustrates the purposes of the federal law. This criterion is not easy to meet. For example, a state law does not frustrate federal purposes merely because it provides for less competition, *La.Pub.Serv.Com. v. FCC*, 476 U.S. 355 (1986), or requires that federally licensed vessels in interstate commerce also meet local pollution standards, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), or prohibits items transported in interstate commerce that do not meet state maturity standards which are set higher than federal maturity standards. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In all these cases, the state requirements place hurdles in the way of federal regulation, but theses hurdles are not treated as improper unless the party claiming preemption proves that Congress clearly intended to preclude concurrent state and federal regulation. *See* 2 Rotunda & Nowak, *Treatise on Constitutional Law* § 12.4 at 91 (2d ed. 1992).

The Supreme Court's recent preemption cases signal that, out of respect for Federalism, the more democratic branches of the central government should be preferred to make the primary decisions limiting the power of the states to regulate concurrently with the federal government. Because Congress has the ultimate power to decide preemption cases—Congress after all can always overrule the Court on this question—Congress ought to exercise this power unambiguously and shoulder the ultimate responsibility as well. *Id.; cf. Michigan v. Long*, 463 U.S. 1032 (1983)(states should not be bound by phantom federal restrictions).

2. If not overruled, the panel decision should be limited and clarified. The panel majority evidently was not at first

convinced by the plaintiffs' argument that *de facto* determinative primary elections may stand because they do not "actually conflict" with the federal election day law, while *de jure* determinative primary elections do conflict and are therefore preempted. Instead of distinguishing between *de facto* and *de jure* determinative primary elections, the panel held sweepingly that "Congress intended that *all* determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8." *Love v. Foster*, 90 F.3d 1026, 1030 (emphasis added). Specifically, 2 U.S.C. § 8 provides that "[t]he time for holding elections . . . for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." Under the panel majority holding, any system permitting a determinative primary election, whether *de facto* or *de jure*, before the federal election day, is preempted. According to the original panel decision, only elections by plurality vote on the federal election day or primaries held on that day, followed by run-off elections afterwards, are permissible, because all election day primary systems allow the possibility of either *de facto* or *de jure* determinative elections, both of which "actually conflict" with the federal law.

The panel majority's supplemental per curiam suggests, but does not clearly acknowledge, abandonment of its original broad holding in favor of a rationale based on the *de jure—de facto* distinction underlying the plaintiffs' argument. The per curiam states that "all we hold is that Louisiana's election plan, to the extent it precludes any *legal* election...on Federal Election Day, conflicts with..." the federal election day law. (emphasis added)

The panel majority's resolution of the case is flawed in sev-

eral respects. The court is left without a single, clear justification for its decision. The panel neither clearly states its intention to jettison its original broad holding nor offers any explanation for its approval of a strictly *de jure—de facto* rationale. Consequently, the doubt that the initial opinion casts on all pre-federal election day primary systems has not been dispelled; and the per curiam is void of any demonstration of a Congressional intent to displace either open or partisan primary systems that incorporate the federal election day. As a further result, the panel majority fails to give clear guidance to states in the framing of election laws. Although it suggests one way to devise an open primary system compatible with federal law, the two rationales the panel majority in turn embraces suggest other contradictory possibilities—on the one hand, that no pre-federal election day primaries that might result in *de facto* elections are permissible; on the other, that an open election system such as Louisiana's will pass muster if it prevents *de jure* determinative primary elections by allowing for write-in candidates and by requiring that a primary victor's name be placed on the ballot on the federal election day.

Conclusion

This case presents issues worthy of the time, attention, and efforts of the entire court, viz., whether the panel precipitously declared state statutes preempted by federal law without following the teachings of the Supreme Court, and whether the panel decision's potential serious impact on other state primary election systems warrants further clarification and limitation. Accordingly, I respectfully dissent from the court's decision to deny reconsideration of this case.